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Supreme Court of the United States

October Term, 1961

No. 549

DRIVERS AND CHAUFFEURS LOCAL UNION NO. 816, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Drivers and Chauffeurs Local Union No. 816, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, respectfully prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on August 17, 1961.

Opinions Below

The decision and order dated June 7, 1960 of the National Labor Relations Board, directing petitioner herein to cease and desist picketing of the premises of Montgomery Ward & Co., Inc., at 75 Varick Street, New York, N. Y. is reported at 127 N.L.R.B. 1059 (Appendix B, *infra*, pp. 15a-20a). The opinion of the Court of Appeals enforcing the decision and order of the National Labor Relations

Board (Appendix C, *infra*, pp. 21a-24a), not yet officially reported, appears unofficially at 48 Labor Relations Reference Manual, p. 2590. The intermediate report and recommended order of the Trial Examiner of the National Labor Relations Board, upon which that Board's decision and order is based, is not officially reported, but is reprinted herein *infra* at Appendix A, pp. 1a-14a.

Jurisdiction

A decree of the United States Court of Appeals for the Second Circuit enforcing the decision and order of the National Labor Relations Board in the instant case was entered on August 17, 1960. The jurisdiction of this Court to review that decree by writ of certiorari is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether an agreement between private parties determining which of them will thereafter be considered the "employer" of specified third persons forecloses said third persons from showing that, for the purpose of rights and liabilities under the public law which depend upon the existence of an employment relationship, that agreement is not conclusive.

2. Whether an employer may, for the purpose of the secondary boycott provisions of the National Labor Relations Act, obliterate the employment relationship between himself and employees performing functions organic to his business by assigning said employees to an independent contractor who thereafter acts solely as a payroll agent, while said employer retains all or most other attributes of employer with respect to them.

3. Whether employees so assigned may effectively be deprived of their right to engage in concerted activities for their mutual aid and protection against their actual employer under Section 7 of the National Labor Relations Act.

4. Whether an employer is entitled to legal insulation from the peaceful effects of a labor dispute if he is neither wholly neutral nor completely unconcerned in that labor dispute.

Statute Involved

NATIONAL LABOR RELATIONS ACT *

Sec. 8

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9;

Statement

Montgomery Ward and Company (hereinafter called "Ward") does business at several locations within the City of New York, one of which is its Fashion Pool, at 75 Varick Street, New York, New York. The Fashion Pool is

* As of September 1, 1959.

a receiving and staging depot where merchandise is assembled and shipped to Ward retail stores throughout the United States.

Ward owns no trucks for the hauling of merchandise to and from the Fashion Pool. Instead, it has an arrangement with a vehicle lessor whereby trucks are furnished to it and the lessor assumes responsibility for keeping payroll records and paying payroll taxes for the drivers of these trucks.

Emil Wesely and Alex Stern, members of petitioner Local 816, were the drivers of trucks so furnished by various lessors utilized by Ward from time to time. During the fifteen years in which Wesely worked at the Fashion Pool, Ward successively utilized Gilbert New York Motor Haulage, Rentways, Inc., and finally Hertz Metropolitan Motorways (hereinafter referred to as Hertz), for truck rental and driver payroll services at the Fashion Pool.

Wesely was carried on the payroll of each of these vehicle leasing concerns, but the termination by Ward of its contract with Gilbert, and later with Rentways had no effect upon Wesely's employment or upon the nature of his regular duties. Wesely continued to perform his customary work at the Ward Fashion Pool, driving a truck prominently bearing the Ward name, emblem and colors, carrying Ward merchandise exclusively, despite and throughout several changes by Ward in equipment and equipment lessors.

Stern, a driver at Ward's Fashion Pool for eight years, similarly survived the termination of the relationship between Ward and Rentways, his nominal employer. Stern was *hired by Ward* in 1951 to do the work which he thereafter performed continuously until August 31, 1959. No truck lessor participated or was considered or involved in the decision by Ward to hire Stern.

The trucks leased to Ward, driven by Wesely and Stern, always left the premises of the lessor before starting time in the morning and returned to the lessor's garage after finishing time in the evening. Each day, Wesely and Stern were required by Ward to fill out a Ward time sheet and Ward work sheets containing an account of all work performed that day. Wesely and Stern enjoyed rights and privileges of Ward employees, including the special discount on purchases made at Ward's employees' stores. For fifteen and eight years respectively, the nature and details of the work performed by Wesely and Stern were supervised and controlled not by Gilbert New York Motor Haulage, Rentways, or Pertz, the successive lessors, but solely by Montgomery Ward.

On or about August 31, 1959, Ward terminated its relationship with Hertz, the lessor who had supplied it with trucks for the most recent period prior to that date. On September 1, 1959, the Sidel Truck Leasing Corporation began furnishing Ward with the two trucks formerly provided by Hertz and its predecessors. On this occasion, however, Ward failed to retain Wesely and Stern as the drivers, even though these two drivers had always survived such changes in the past.

At the time that Wesely and Stern lost their jobs, they were members of petitioner Local 816 and their wages, hours and working conditions were governed by a collective bargaining agreement between petitioner and the equipment lessor which had been executed by the latter in the following manner: "Motorways, Inc. [Hertz] F. A. Montgomery Ward & Co.". On September 1, 1959, approximately one year remained unexpired to the term of this collective bargaining agreement, effective from September 1, 1958 to and including August 31, 1960.

Upon the dismissal of Wesely and Stern, Local 816 commenced grievance procedures with Ward. When Ward persisted in its refusal to retain drivers Wesely and Stern

on the two leased trucks, these two employees publicized their grievance and protested the loss of their jobs by picketing the premises of Ward. This picketing was at all times peaceful, lawful and unaccompanied by violence or coercion, or threats of violence or coercion. Picketing continued until September 15, 1959.

Outgoing shipments from the Fashion Pool are under the direct supervision and control of Albert Wilson, Ward's regional traffic manager. Such shipments were transported in the trucks driven by Wesely and Stern. The Ward shipping clerk, a subordinate of Mr. Wilson, regularly told Wesely and Stern what goods to deliver and where and how to deliver them. The same person also directed Wesely and Stern to make occasional pick-ups for return to the Fashion Pool. All supervision and control of the details of the work of these two men, insofar as supervision and control were necessary, was vested in and actually performed by Ward or its agents. No such control or supervision was ever exercised by the lessor or its agents.

The trucks driven by Wesely and Stern for fifteen and eight years respectively, although used exclusively for Ward's purposes, carrying Ward merchandise and bearing the Ward emblem, were owned, fueled, insured and maintained by Hertz. But Hertz exercised no supervision or control over the duties of Wesely and Stern. Moreover, Hertz, nominally their "employer" within the meaning of the Ward-Hertz contract, was wholly unaware of how these men spent their time during their eight hours at Ward's each day.

Hertz is a lessor of motor vehicles, maintaining 6,000 trucks in the New York City area for leasing purposes. Of these, 5,800 trucks are leased in an unmanned condition or are maintained as a reserve for emergencies, and the remaining 200 trucks are manned by drivers maintained on Hertz payrolls for the account of the truck lessee.

The contract between Hertz and Ward, providing for the rental to Ward on a steady basis of two trucks manned by drivers, was drafted in a form prescribed by Ward, apparently a form commonly used by Ward and others for vehicle leasing contracts, containing provisions expressly designed to insulate Ward from any responsibility for Wesely and Stern.

Paragraph 11 of this contract states, in part:

> "It is understood that this is not an agreement of partnership or employment of Carrier or any of Carrier's employees by Wards. It is expressly understood and agreed that the equipment and personnel referred to above shall at all times be under the sole and absolute control of Carrier, who shall have the sole right of employment and discharge of such personnel."

The drivers assigned to each lessee are separately carried on Hertz's books, distinct from all other drivers on Hertz's payroll. There is no interchange of seniority among these small units of drivers and seniority exists only within each unit. Hertz did not regard itself as the employer of Wesely and Stern, and recognized an obligation to them only insofar as and so long as Ward continued to rent vehicles from Hertz. Their employment rights continued only so long as the particular vehicle leasing contract under which they worked remained in effect. The cancellation of that contract by Ward automatically terminated their right to continued employment, so far as Hertz was concerned.

Upon the petition of Ivan C. McLeod, Regional Director of the Second Region of the National Labor Relations Board, a temporary injunction was issued pursuant to Section 10(l) of the National Labor Relations Act, as amended, 29 U. S. C. § 160(l) against the picketing by Wesely and Stern described above, by the United States District Court for the Southern District of New York

(178 F. Supp. 288). Upon appeal, the issuance of this temporary injunction was affirmed by the United States Court of Appeals for the Second Circuit (277 F. 2d 800).

The Trial Examiner of the National Labor Relations Board issued his Intermediate Report and Recommendations on February 23, 1960 finding that the picketing by Wesely and Stern violated Section 8(b)(4)(A) and (B) of the National Labor Relations Act, as amended. The findings of the Trial Examiner were affirmed by the National Labor Relations Board on June 1, 1960 (127 NLRB 1059).

Petitioner sought judicial review of this decision and order of the National Labor Relations Board by the United States Court of Appeals for the Second Circuit. The jurisdiction of that Court was based upon Section 10(f) of the National Labor Relations Act, as amended, 29 U. S. C. Section 160(f). The National Labor Relations Board, respondent below, cross-petitioned for enforcement of the decision and order of the National Labor Relations Board under Section 10(c) of the National Labor Relations Act, as amended, 29 U. S. C. Section 160(c).

Reasons for Granting the Writ

1. The secondary boycott provisions of Section 8(b)(4) were intended to protect only those employers who are completely neutral and wholly unconcerned in the labor dispute of which the challenged conduct is a part. The purpose of Section 8(b)(4) is to prevent coercion by unions directed against innocent employers who, even if they wished to accede to the union's demands, would be powerless to do so because of their total lack of concern or connection with the subject matter of the labor dispute. This purpose was expressed by Senator Taft when he stated, in regard to Section 8(b)(4):

> "The provision makes it unlawful to resort to a secondary boycott to injure the business of a third

> person who is wholly unconcerned in the disagreement between an employer and his employees." (93 Cong. Rec. 4198 (1947) (remarks of Senator Taft.))

Here, however, the very fact that Wesely and Stern had continued to work for Ward in spite of repeated changes in truck lessors amply demonstrates that it was solely within the power and discretion of Ward to determine whether or not Wesely and Stern would continue in the jobs which they had occupied for so many years. The picketing in which Wesely and Stern engaged following their discharge was a primary expression of their grievance, directed to that party which could most directly and effectively provide the remedy which they sought—Montgomery Ward. Such conduct is not prohibited by the Act.

That only those employers who are completely neutral and wholly unconcerned in the labor dispute are entitled to the protection of Section 8(b)(4) of the Act was acknowledged in the opinion of Chief Judge Ryan in *McLeod* v. *Local 816*, 178 F. Supp. 288 (D. C. N. Y. 1959):

> "Respondent further claims that if Montgomery Ward was a party to this dispute, or was not a neutral or an innocent bystander then the Act affords it no protection. With this latter premise, we agree. *Douds* v. *Metropolitan Federation of Architects, Engineers, Chemists and Technicians Local 231 et al.*, 75 F. Supp. 672. The status of Montgomery Ward in this situation is the pivotal point to be decided here • • •." (178 F. Supp. at 290.)

Both the *Douds* case cited by Chief Judge Ryan and the case of *Local 24, I.B.T.* v. *N.L.R.B.*, 266 F. 2d 675 (D. C. Cir., 1959) confirm that, as a matter of law, the principle stated in the above quoted portion of Chief Judge Ryan's opinion is not open to dispute.

The *Local 24* case, *supra*, is similar to the case at bar. Petitioner believes that the decision in the *Local 24* case,

refusing to enforce an order of the National Labor Relations Board, places the District of Columbia Circuit squarely at odds with the Second Circuit on the use by employers of equipment leasing contracts and independent contractors as devices to avoid the effects of permissible primary picketing. In the light of the greatly increased utilization by management of leased vehicles and equipment for income tax and other purposes, the issue presented by this case is one of potentially great impact upon labor relations. Otherwise stated, if Ward is held to be protected by the Act from the Section 7 activities of employees such as Wesely and Stern, while such activities, if directed at Hertz, could never be effective to accomplish their reinstatement to their former jobs, Wesely and Stern, or others similarly situated, will find themselves effectively deprived of the right, guaranteed by the Act, to engage in such activities against the only party capable of granting the relief which they seek.

Just as Ward enters into contracts with truck lessors for the use of vehicles, A.C.E., a large trucking company involved in the *Local 24* case, there contracted with individual tractor lessors for the use of tractors manned by drivers. Just as Wesely and Stern are carried on the Hertz payroll, there the tractor drivers were paid on the lessors' payrolls, and were not carried as employees of A.C.E. Just as Ward here contends that it is wholly unconcerned with a labor dispute said to originate between Hertz and these two employees, A.C.E. there claimed that it occupied a neutral position and bore no responsibility for a dispute between the tractor lessors and the drivers hired by the latter, who were nominally the tractor lessors' employees. Similarly, the striking drivers in that case had been charged with violation of Section 8(b)(4)(A) and (B) because they had picketed the premises of A.C.E.

Just as many strands of the employment relationship were shown to link A.C.E. with the striking drivers in that

case, here the record bears evidence of the many attributes of the relationship to which Ward, on the one hand, and Wesely and Stern, on the other, were parties. Here, however, the case against Ward becomes stronger, since it seems clear that

> 1. The job of Emil Wesely survived the termination by Ward of its contract with each of the various truck lessors which it utilized between 1944 and August 30, 1959.
>
> 2. Ward, without the advice or participation of Rentways, Inc., the truck lessor at the time, hired Alex Stern.
>
> 3. The collective bargaining agreement between Hertz and Local 816 was executed by the former "F. AC MONTGOMERY WARD."

Chief Judge Prettyman, writing the opinion in the *Local 24* case for the Court of Appeals of the District of Columbia, held that the striking drivers had not violated Sections 8(b)(4)(A) and (B) of the Act, and refused to enforce the Board's order. His opinion makes it clear that it was not necessary to find that A.C.E. was a primary employer in respect to the striking employees. And, in fact, such a finding was not made. The decision is based upon the principle that an employer, whether primary or secondary, is not entitled to the protection of Sections 8(b)(4)(A) and (B) unless that employer is found to be wholly unconcerned and completely neutral in the labor dispute from which the concerted activity arose:

> "The answer to the problem before us cannot be reached by the use of any legalistic word or phrase, such as 'co-employer' or 'independent contractor,' or even 'ally'. It cannot be solved by the strict application of the technicalities which adhere to such legal terms. The problem is, as dissenting member Bean put it, whether the facts and circumstances are such that the strikers violated the secondary boy-

cott provision of the statute when they picketed the terminals of ACE and induced the employees of ACE to honor their picket lines.

"It is our view that the relationships of ACE, these drivers, and the lessor-owners are so intertwined with respect to employment that ACE was not protected by the drivers against the lessor-owners. The many tiny strands of ACE control over these drivers cannot be extricated from the total fabric of mutual obligation. Those strands are clearly part of the pattern of the employer-employee relationship.

"* * * Sections 8(b)(4)(A) and (B) cannot be read or applied literally; it must be construed. Of course, in an area so wide as is the field of labor relations, there are many situations in which the answer to a dispute under this section is easily derived by the application of such legalistic formulae as 'independent contractors', 'co-employers', or 'allies'. But it is equally clear that there is a zone of dispute in which such formulae are useless, and the answer must be derived by applying the intent of the statute to the facts in the case. This is such a case. We need not devise a new word to describe the relationship here depicted. We think the Board erred in limiting itself to the meaning of the legal term 'independent contractor'.

To state the matter otherwise, we agree with the contentions of our petitioners as the trial examiner described them. He said:

> 'Rather, the Respondents (our petitioners) say, the business of the Lessors and ACE are so integrated operationally that for the purposes of this proceeding they must be deemed either a single employer, a joint or common venture, a "straight line" operation within the Board's understanding of that term, or an alliance of interest. The Respondents maintain that whichever term may best be used to describe the relationship among ACE and the Lessors, their business arrangements are such that in the Union's dispute with the Lessors, or any one of them nei-

ther ACE nor any of the Lessors is so unconcerned therewith that it is statutorily shielded as a neutral from an extension of the dispute by the Union to its operations, and, therefore, the Union's picketing and inducement herein occurred at premises which in this proceeding should be regarded as primary and not secondary.'

(RULING)

"It is our conclusion that in picketing the ACE TERMINALS and in inducing ACE employees to honor the picket line the strikers did not violate the secondary boycott provision of the statute." (266 F. 2d at 680-81)

The attention of the Court is respectfully directed also to the case of *Douds* v. *Metropolitan Federation of Architects, Engineers, Chemists & Technicians*, 75 F. Supp. 672 (S.D.N.Y. 1948). In that case, because the employees of Ebasco were on strike, Ebasco contracted out certain of its work to Project. When the strikers thereupon picketed Project, they were charged with violation of Section 8(b)(4). In holding the picketing not to be in violation of the ban on secondary boycotts, Judge Rifkind stated:

"• • • I am unable to hold that corporate ownership or insulation of legal interests between two businesses can be conclusive of neutrality or disinterestedness in a labor dispute.

"• • • In encouraging a strike at Project the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it." (75 F. Supp. at 674).

2. The Board's Trial Examiner found that Hertz was an independent contractor and that Wesoly and Stern were employees of Hertz and not of Ward. He further found that *Hertz maintained control over these drivers*, and that

because Ward owned no stock in Hertz nor exercised any control over Hertz, no relationship existed between Hertz and Ward which would permit these employees to picket Ward. These findings were affirmed by the Board.

Initially, the finding that Hertz maintained control over these drivers is wholly without support in the record. Ward's control over Wesely and Stern was continuous and pervasive, and, merely by the process of elimination, few if any of the duties or functions of these drivers remained subject to the supervision or control of anyone other than Ward. Merely the proportion of time spent by these drivers at the respective establishments of Ward and Hertz suggests where the power to supervise and control their duties resided.

Furthermore, it should be apparent that it was Ward who controlled the nature of its relationship with Hertz and with Wesely and Stern. By its tailor-made truck-leasing contract with Hertz, its retention of Wesely and Stern despite repeated changes in truck lessors, and its hiring of Stern, Ward demonstrated that it controlled not only the nature and details of the employment of these two drivers, but also the character of the complex relationships from which this entire dispute arises.

The Trial Examiner made no determination of whether Ward is neutral or unconcerned in the labor dispute. In fact, both the Trial Examiner and the Board itself seem to have ignored these important criteria completely, restricting their inquiry to the question of whether traditional agency, ally, or employer-employee relationships could be spelled out. Because the issues of neutrality and concern were treated in great detail in petitioner's brief to the Trial Examiner, it is apparent that his silence demonstrates a rejection of these issues as legally insignificant.

The neutrality and concern of Ward were regarded as most significant, however, by Chief Judge Ryan who, in a

related proceeding in the District Court, held that these points were dispositive of the case (*McLeod* v. *Local 816, I.B.T., supra*). It has many times been held that Section 8(b)(4) does not protect employers who are neither completely neutral nor wholly unconcerned with a dispute involving another employer.

> *Local 24, I.B.T.* v. *N.L.R.B.*, 266 F. 2d 675 (D. C. Cir. 1959);
> *Douds* v. *Metropolitan Architects*, 75 F. Supp. 672 (D. C. N. Y. 1948);
> *N.L.R.B.* v. *Electrical Workers*, 228 F. 2d 553 (2 Cir. 1955);
> *Rabouin* v. *N.L.R.B.*, 195 F. 2d 906 (2 Cir. 1952);
> *Irwin Lyons Lumber Co.*, 87 N.L.R.B. 54.

For these purposes,

> "'concerned' means related or connected through activities, not through the incident of ownership or management" (*Alpert* v. *United Brotherhood of Carpenters*, 143 F. Supp. 371, 375.)

The findings of the Trial Examiner, as adopted by the Board, are primarily concerned with establishing the fact that Hertz is an independent contractor, and, based upon that fact automatically concluding that the drivers of the trucks leased by Hertz are employees of Hertz and not Ward. Hertz may well be an independent contractor, and this fact would in no way preclude a finding that Wesely and Stern, while nominally employees of Hertz, are, for the purposes of the Act, employees of Ward, or of both Ward and Hertz, or that Ward is neither neutral nor unconcerned in this labor dispute. Indeed the Board has found that truck lessors who drive their own trucks are independent contractors as lessors, and at the same time employees of the truck lessees. *Hoster Supply Co.*, 109 NLRB 466. Merely the characterization of the nominal employer as an

independent contractor does not require a conclusion that the picketing by Wesely and Stern is secondary and unlawful.

> *Local 24, I.B.T.* v. *N.L.R.B.* (*supra*);
> *Douds* v. *Metropolitan Architects* (*supra*);
> *West Texas Utilities Co.*, 108 N.L.R.B. 407, *enf.* 218 F. 2d 824 (5 Cir. 1955), *cert. den.* 349 U. S. 95.

See also *N.L.R.B.* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756 (3 Cir. 1951), *cert. den.* 342 U. S. 919.

3. The truck leasing agreement between Ward and Hertz appears to have been drawn to Ward specifications. It contains a provision that drivers of the leased trucks are to be considered employees of the lessor. Such a provision, however forceful it may be as between Ward and Hertz, has no binding effect upon the resolution of this dispute. Judge Rifkind, in *Douds* v. *Metropolitan Architects, supra*, was faced with a like provision in a similar case. He stated:

> "True enough, the contract prescribes that 'all employees furnished by the seller shall at all times be and remain employees of the seller.' I do not, however, draw therefrom the inference advocated by the petitioner and the charging party. *The very need for such a provision emphasizes the realization of the parties that they were doing business on terms which cast a shadow of doubt upon the identity of the employer.* Without question, Ebasco and Project were free to contract, who as between themselves, should be subject to the burden and possessed of the privileges that attach to the employer of those on Project's payroll. But the law is not foreclosed by such agreements to examine the reality relevant to the purposes of a particular statute. * * * " (Emphasis supplied) (75 F. Supp. at 675).

See also:

> *Hoster Supply Co.*, 109 N.L.R.B. 466;
> *Orange Crush of P. R. Inc.*, 118 N.L.R.B. 217;

Rutherford Food Corp. v. *McComb*, 331 U. S. 722; *Western Union* v. *McComb*, 165 F. 2d 65 (6 Cir. 1947).

In the words of Judge Rifkind, the very need for the provision of paragraph 11 of the agreement emphasizes the realization of Ward and Hertz that they were doing business on terms which cast a shadow of doubt upon the identity of the employer of Wesely and Stern.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court issue its writ of certiorari to review the decision below.

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APPENDIX A

Intermediate Report and Recommended Order of Trial Examiner

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Trial Examiners
Washington, D. C.

Case No. 2-CC-525

———o———

DRIVERS AND CHAUFFEURS LOCAL UNION NO. 816, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and

MONTGOMERY WARD AND CO., INCORPORATED

———o———

Before:

JOHN F. FUNKE, *Trial Examiner.*

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before the undersigned Trial Examiner on December 15, 16, 17 and 22, 1959, and January 14, 1960, at New York, New York, upon the complaint of the General Counsel and the answer of the Respondent. The issue litigated was whether or not Drivers and Chauffeurs Local Union No. 816, herein called the Respondent or the Union, violated Section 8(b)(4)(A) and (B) of the Act by inducing the employees of Montgomery Ward and Co., Incorporated, herein

called Ward, and the employees of truckers and suppliers of Ward to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle goods, articles, materials or commodities to force Ward to cease doing business with Sidel Truck Leasing Corporation, herein called Sidel, and or to force Sidel to recognize or bargain with Respondent as collective bargaining representative of the employees of Sidel although Respondent was not certified as such bargaining representative pursuant to Section 9 of the Act. The General Counsel and counsel for the Respondent presented oral arguments and the parties were given until February 15 to file briefs. Briefs were received on that date from the parties.

1. The Business of the Company

Ward maintains its office and principal place of business in Chicago, Illinois. It operates other offices, retail stores, catalogue stores, mail order offices and distribution centers in various States of the United States, including a place of business at 75 Varick Street, New York, New York. The annual volume of retail sales of Ward is in excess of $200,000,000. During the past year Ward caused to be purchased, transferred and delivered to its various places of business merchandise valued in excess of $10,000,000. Merchandise valued in excess of $10,000,000 was transported to said places of business in interstate commerce directly from States of the United States other than the States in which said places of business are located.

Ward is engaged in commerce within the meaning of the Act.

Appendix A—Intermediate Report and Recommended Order of Trial Examiner

II. Labor Organization Involved

Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts

1. *The employment of the drivers*

The source of economic consternation and distress to Ward, one of the two largest retail and catalogue sales organizations in the world, in September 1959, was the termination of employment of two delivery truckdrivers, Emil Wesely and Alex Stern. Their termination provoked into multiple legal action the remedial machinery of the National Labor Relations Board, resulting in the proceeding herein as well as companion litigation. Wesely and Stern were terminated on September 1, 1959, when the contract between Ward and Metropolitan Truck Rental Service, herein called Metropolitan, a division of Hertz Corporation, was cancelled. (Cancellation was effective as of the close of business, August 31, 1959.)

Wesely was first employed as a driver at Ward's Fashion Pool, 75 Varick Street, New York, New York, in 1944 or 1945. From that time until September 1, 1959, he was continuously employed making deliveries of merchandise to and from the Pool. He was a member of Local 816, the Respondent herein, when first employed and at all times thereafter. When he was first assigned to Ward he was driving for New York Haulage, a subsidiary of Gilbert Carriers, which had a contract to perform trucking services for Ward. According to Wesely, sometime in 1952 the contract between New York Haulage and/or Gilbert Car-

riers and Ward was terminated and a contract for similar services was made by Ward with Rentways, Inc. Wesely was notified of this by the dispatcher at Ward, went to Rentways and was employed to drive under the Ward contract. Later Rentways, Inc., was purchased by Metropolitan, the contract with Ward was assumed and Wesely continued to make the Ward deliveries until September 1, 1959.

The experience of Stern was similar to that of Wesely except for the fact that he was first employed when Rentways was the contracting trucker, in 1950 or 1951. He survived the change to Metropolitan and, like Wesely, was continuously employed making deliveries to and from the Fashion Pool until September 1, 1959.

The duties of the drivers were fixed and routine. There was no substantial change in their method of operation under the successive trucking contractors. Under Metropolitan they reported to work each morning at the Hertz garage where they punched the timeclock. They then took the trucks [1] to the Fashion Pool. At the Fashion Pool they signed a timesheet and were given the merchandise to be delivered for Ward. For each trip the drivers signed a "Truckers Load Signature Record" [2] which indicated the terminal to which the load was destined and the bills of lading and number of pieces pertaining to each load. This was Ward's receipt for the merchandise turned over to the driver. The driver was also given a "Retail Pool Trip Schedule" [3] which also contained the destination and num-

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[1] The truck bore Ward's name, Ward's colors and Ward's advertising symbols to conform to Ward's own trucks. They were owned by Metropolitan and all maintenance was the responsibility of Metropolitan.

[2] General Counsel's Exhibit #6.

[3] General Counsel's Exhibit #7.

ber of pieces in each truckload. This sheet was turned in the following day together with the bills of lading. The drivers usually made three trips each day and selected their own routes for making deliveries. The testimony is uncontradicted that the work required little or no supervision but such instructions as were required they received from Ward's shipping clerk. No complaints were made against the drivers and until its conclusion, which was no fault of the drivers, the arrangement was a happy one.

The terms of employment under which Wesely and Stern worked were fixed by a collective bargaining agreement between Motorways, Inc.,[4] and the respondent Union.[5] The drivers were paid their wages by Motorways, Inc., and all withholding taxes, social security deductions, etc., were paid by Motorways. All benefits to the drivers were fixed by the collective bargaining contract. Although this contract designated "Motorways, Inc., F/AC Montgomery Ward & Co."[6] as the employer there is no evidence to establish that in making the contract Motorways acted as agent of Ward. There is substantial evidence that it did not. Giles Wanamaker, vice president of Hertz, testified that Ward neither authorized nor participated in the negotiation of the contract nor was Ward advised of its terms. The abbreviation "F/AC" was used by Motorways to identify the contract as covering employees of Metropolitan employed pursuant to a contract with Ward, and only for the conveniences such identification provided Motorways and Metropolitan.

Neither Wesely nor Stern was processed through the hiring procedures maintained by Ward and neither received

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[4] Motorways, Inc., was another Hertz corporation which provided a payroll service for Metropolitan and other Hertz subsidiaries.

[5] General Counsel's Exhibit #15.

[6] F/AC meant "for the account of".

the benefits given to Ward employees. They did receive a discount on purchases at Ward and a Christmas present from Ward but such discounts and presents were made available to persons who were not employees of Ward but who regularly performed services for Ward.[7]

2. *The contracts between Ward and the truckers*

The contracts between Ward and Metropolitan[8] and between Ward and Sidel,[9] while not identical, were closely similar in their terms. Each provided that the carrier-contractor should provide Ward with a trucking delivery service. The carriers furnished two van type, closed trucks and such additional trucks as might from time to time be needed. All vehicles were to be owned, maintained, and operated by the carrier at its expense. The carrier was also required to furnish a licensed driver for each vehicle.[9a] Ward paid the carriers a flat weekly rate for the two trucks regularly required and a daily rate for each additional truck. Provisions were included for overtime and holiday pay when the services were so required. Mileage in excess of 150 miles per day was on a mileage rate. All indemnity and other insurance except cargo insurance was paid by the carrier.

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[7] New York City policemen and firemen regularly protecting Ward received such gratuities.

[8] General Counsel's Exhibit #5.

[9] General Counsel's Exhibit #8.

[9a] The contract between Metropolitan and Ward provided: "It is understood that this is not an agreement of partnership or employment of Carrier or any of Carrier's employees by Wards and it is expressly understood that the equipment and personnel referred to above shall at all times be under the sole and absolute control of the Carrier, who shall have the sole right of equipment and discharge of such personnel." (Clause 11, G. C. #5.)

Appendix A—Intermediate Report and Recommended Order of Trial Examiner

3. The strike and its objects

When Wesely and Stern returned to the Hertz garage at the end of the day on August 31, they were told by the garage manager that their employment was terminated because the contract with Ward had been cancelled. On the next day, September 1, they, together with a representative of the Union named Forzano, went to see Harry Ebling, Ward's traffic manager at 75 Varick Street. Forzano told Ebling, according to Ebling and the testimony is not contradicted, that he had talked to Hertz and that the drivers had been discharged by Hertz. Forzano demanded that the men be put back to work to which Ebling replied that the men were employees of Hertz and had never been on the Ward payroll. He told Forzano that Sidel was the new carrier-contractor but Forzano still insisted that the drivers be put on the payroll. Ebling then consulted with Ward's Regional Traffic Manager Wilson and returned with the same answer—the men were Hertz employees. Forzano and the drivers then left with Forzano stating that the Union would take the necessary action.

The next day Wesely and Stern appeared at the loading area at 75 Varick Street and commenced picketing. This building is occupied by other businesses than Ward and the loading area is divided into six bays. One bay is reserved exclusively for Ward although other bays may be used by Ward if its own bay is overcrowded and another bay is available. According to their own testimony Wesely and Stern picketed in front of all six bays but there was no interference with deliveries to other tenants of the building. According to witnesses for the General Counsel trucks of carriers which were making deliveries to Ward [10] would

[10] There were 15 carriers who made regular daily deliveries to Ward and these had been placed on a regular time schedule to avoid congestion at the dock.

stop when they saw the pickets, speak to the pickets, then enter either 75 Varick Street or another building, return and drive away without unloading. For a period from September 2 until September 19 none of the 15 carriers which made daily scheduled deliveries to Ward completed their deliveries. As a result some 90 of the 130 Ward employees at the Fashion Pool were laid off and business at the pool ceased.[11] The pickets bore signs with the legend "Montgomery and Ward unfair to Chauffeurs Union, Local 816." The picketing was peaceful and conducted by Wesely and Stern only. Stern testified that when the driver of a truck asked what the trouble was he told him that they (the pickets) were locked out. The immediate purpose of the picketing was to make it clear that a dispute existed with Ward over the termination of their employment.

H. Kenneth Sidel, secretary-treasurer of Sidel Trucks Leasing Corporation and president of Florbrooke General Storage and Distributing Corporation, testified that as a result of negotiations he entered into a contract to provide delivery service for the Fashion Pool operations of Ward on September 1, 1959. The services to be provided were those which had been provided by Metropolitan. To perform these services he obtained one driver from Local 138 of the Teamsters, with whom he had a contract covering some of his Jamaica operations for Ward, and the other driver he transferred from Florbrooke. This driver was a member of Local 184 but joined 138 pursuant to Sidel's contract with that Local. Both drivers were covered as to their terms of employment by the contract between Local 138 and Sidel while working under the Ward delivery contract.

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[11] The Fashion Pool did [illegible] sales [illegible] $150,000 daily.

Appendix A—Intermediate Report and Recommended Order of Trial Examiner

On September 1 Kenneth Sidell testified to a telephone call which he had received from Lester Connell, Secretary-treasurer of respondent Union, Local 815. He testified that he was informed by Connell that the operations at 75 Varick Street now performed under Sidell's contract with Ward were subject to an existing contract as to the drivers with Local 815. Sidell was told that he was expected to keep this contract in full force and effect and that the drivers who had been taken off were to be paid for that day and put back to work the next day. According to Sidell if this were not done then picketing would be the only remedy. Sidell then called Local 815 and as a result of talking with officials of Local 815 called Connell back. Sidell offered to assume the contract between Local 815 and Metropolitan until its expiration date, which was August 31, 1960. At that time, however, Sidell wanted to be free to negotiate with Local 815. Connell's reply was that at the end of the contract he and Sidell would negotiate. Sidell did not accept this and there were no further conversations with any representative of Local 815. Sidell was unable to perform under its contract with Ward until the picketing ceased about September 15.

Lester Connell was not called as a witness by Respondent.

B. Conclusions

The testimony and documentary evidence in this case are largely free from dispute. The parties disagree on the inferences and conclusions to be drawn therefrom.

It is my finding that Wessely and Stern were employees of Metropolitan and not of Ward. In making this finding great weight is attached to the fact that the terms of their employment were fixed by the collective bargaining contract between Motorways and the Respondent. Motorways

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like Metropolitan, was a subsidiary and agent of Hertz. It is clear that in executing this contract Motorways was in no way an agent of Ward. Ward neither authorized the making of the contract, participated in its negotiation, nor adopted or ratified its terms. Ward owned no stock in Motorways nor exercised any control over it. Apart from this factor which, in the circumstances of this case, I would find controlling standing alone, Wesely and Stern never were processed through the Ward employment procedures, were not terminated through the Ward procedures and enjoyed none of the Ward employee benefits except for the discount privilege and the Christmas gift. Both of these benefits were made available to other persons who were not employees of Ward.

I find that both Metropolitan Hertz and Sidel were independent contractors as to Ward. As to this finding the contracts themselves are the best evidence. Both Metropolitan and Sidel were carriers operating a trucking and truck leasing business in New York, New York. Their trucks and drivers were made available to businesses in New York which found it profitable to lease trucks and drivers under contract terms on a fee basis. The carrier contractors operated for profit and maintained control over their trucks and their drivers. They executed their own collective bargaining contracts for their employees. I find no way, despite the persuasive brief of counsel for the Respondent, to spell out an employer-employee relationship or an agency or ally relationship between Ward and the carrier-contractors, Metropolitan and Sidel.

I find that the picketing of the premises at 75 Varick Street by Wesely and Stern had dual purposes. It was designed (1) to cause Ward to cease doing business with Sidel and to engage a carrier-contractor which would recognize Respondent as the bargaining agent for the drivers employed under the Ward contract or (2) to cause Sidel

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to recognize Respondent as the bargaining agent for the Sidel drivers who would work under the Ward contracts.[12] The accomplishment of either objective would result in the reemployment of Wesely and Stern, a condition in which they had some interest. I find that Wesely and Stern were agents of Respondent in their picketing activities and Respondent has not disclaimed responsibility for their conduct. The picketing was provoked solely by the cancellation of the Metropolitan contract and the resulting unemployment for Wesely and Stern. They took the only action which, so it appeared to them, might lead to their reemployment. Unfortunately for them the objectives by which they sought to realize reemployment and the means they employed have been outlawed by the statute.

In reaching the foregoing conclusions I have been guided by the decision of the Board in *New Jersey Guards Union (Otis Elevator Company)*, 124 NLRB No. 152, which I find indistinguishable both on the facts and the law. In that case Otis cancelled its contract for guard protection service with Burns and contracted with Nilsen. The guards provided by Burns were members of the respondent Union therein and the guards provided by Nilsen were not. In protest against their loss of employment the Burns' guards picketed Otis. The Board held that the picketing at the Otis premises was in violation of Section 8(b)(4)(A). In the instant case we have the additional factor that a demand was made upon Sidel to recognize Respondent as bargaining agent for employees for whom it had not been certified.

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[12] The request made upon Sidel by Secretary-Treasurer Connell that Sidel assume the Master bargaining contract between Motor Ways and Respondent and that it negotiate with Respondent at the conclusion of the contract term is a clear request that Sidel recognize Respondent as exclusive bargaining agent for its employees. It is not denied that Respondent was not certified as bargaining agent for Sidel employees in any appropriate unit.

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Sympathetic as one may feel toward Weedy and Stern, terminated in their employment after years of service and through no fault of their own, I find the decision of the Board in *Otis* controlling and the Respondent in violation of Section 8(b)(4)(A) and (B) of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in this case I make the following:

V. Conclusions of Law

1. Montgomery Ward and Co., Incorporated, and Sidel Truck Leasing Corporation are and at all times material herein were employers within the meaning of Section 2(2) of the Act and Montgomery Ward and Co., Incorporated, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent, Drivers and Chauffeurs Local Union No. 816, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has induced and encouraged the employees of Ward and other employers to engage in a strike or concerted refusal in the course of their employment to perform services for Ward with the object of (a) forcing or requiring Ward to cease doing business with Sidel in violation of Section 8(b)(4)(A) of the Act and or (b) forcing or requiring Sidel to recognize and bargain with Respondent as the exclusive bargaining representative of its employees although Respondent has not been certified as the representative of such employees in any appropriate unit in accordance with the provisions of Section 9 of the Act in violation of Section 8(b)(4)(B) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Sections 2(6) and (7) of the Act.

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The Remedy

Having found that Respondent engaged in certain unfair labor practices, it shall be recommended that it cease and desist therefrom and take certain affirmative action which will effectuate the policies of the Act. Because there is nothing in the record before me to indicate that the action found unlawful herein is likely to be repeated and there is no evidence that such unlawful action has been taken against other employers by Respondent, the recommended order will be limited accordingly.

Recommendations

Upon the foregoing findings of fact and conclusions of law and upon the entire record in this case, I recommend that Drivers and Chauffeurs Local Union No. 816, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, successors and assigns, shall:

1. Cease and desist from picketing the premises of Montgomery Ward and Co., Incorporated, at 75 Varick Street, New York, New York, or in any other manner inducing or encouraging the employees of Ward or of any other employer to engage in a strike or concerted refusal in the course of their employment to perform any services where an object thereof is to force or require Ward to cease doing business with Sidel or to force or require Sidel to recognize and bargain with the Respondent as the collective bargaining agent of Sidel's employees unless the Respondent is certified as the representative of such employees pursuant to the provisions of Section 9 of the Act.

Appendix A—Intermediate Report and Recommended Order of Trial Examiner

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Post at its buiness offices at New York, New York, and all other places where notices to its members are customarily posted, copies of the notice attached hereto and marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by an official representative of the Union, be posted immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material;

(b) Mail to the Regional Director for the Second Region signed copies of the said notice for posting at the premises of Ward and Sidel, if willing, in places where notices to their employees are customarily posted;

(c) Notify the Regional Director for the Second Region in writing, within twenty (20) days from the receipt of this Intermediate Report what steps the Union has taken to comply with the foregoing recommendations.

It is further recommended that, unless on or before 20 days from the receipt of this Intermediate Report, the Union notify the said Regional Director in writing that it will comply with the foregoing recommendations, the Board issue an order requiring it to take the action required by the foregoing recommendations.

Dated at Washington, D. C., this 23 day of February 1960.

JOHN F. FUNKE,
Trial Examiner.

APPENDIX B

Decision and Order of National Labor Relations Board

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

[SAME TITLE]

On February 23, 1960, Trial Examiner John F. Funke issued his Intermediate Report in this proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent, the Charging Party, and the General Counsel filed exceptions to the Intermediate Report. Briefs were filed by the Charging Party and the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Intermediate Report, the exceptions and

briefs, and hereby adopts the findings,[1] conclusions, and recommendations[2] of the Trial Examiner.

ORDER

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Drivers and Chauffeurs Local Union No. 816, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from picketing the premises of Montgomery Ward and Co., Incorporated, 75 Variek Street, New York, New York, or in any other manner inducing or encouraging the employees of Montgomery Ward and Co., Incorporated, and Gilbert Carrier or any other

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[1] In addition to the evidence set forth in the Intermediate Report establishing inducement, we note that Brusco, a driver for Gilbert Carrier, a neutral trucking company, testified without contradiction that when he appeared at Ward's delivery entrance to make a pickup on September 2, 1959, he was told by Wesely, one of the pickets, "Don't pick up; we on (sic) strike." The General Counsel and the Charging Party except to the Trial Examiner's finding that the symbol F AC meant "for the account of" rather than "for account". The record supports this interpretation, and we correct the Intermediate Report accordingly.

[2] The General Counsel and the Charging Party also except to that portion of the recommended notice reading "when we do not represent a majority of such employees in an appropriate unit". We find merit in this exception and shall substitute for the quoted portion the following statutory language: "unless and until we are certified as the representative of such employees pursuant to the provisions of Section 9 of the Act".

employer, to engage in a strike or a refusal, in the course of their employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is (a) to force or require Montgomery Ward Co., Incorporated to cease doing business with Sidel Truck Leasing Corporation or (b) to force or require Sidel Truck Leasing Corporation to recognize or bargain with the Respondent as the representative of its employees unless the Respondent has been certified as the representative of such employees pursuant to the provisions of Section 9 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at its business offices at New York, New York, and all other places where notices to its members are customarily posted, copies of the notice attached hereto as an Appendix.[3] Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by a representative of the Respondent be posted immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[3] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER".

Appendix B—Decision and Order of National Labor Relations Board

(b) Mail to the Regional Director for the Second Region signed copies of the aforesaid notice for posting by Montgomery Ward Co., Incorporated, Gilbert Carrier, and Sidel Truck Leasing Corporation, if willing, at places where they customarily post notices to their respective employees.

(c) Notify the Regional Director for the Second Region, in writing, within ten (10) days from the date of this Order as to what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., June 7, 1960.

.....
Boyd Leedom, Chairman

.....
Philip Ray Rodgers, Member

.....
Joseph Alton Jenkins, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Appendix B—Decision and Order of National Labor Relations Board

APPENDIX

NOTICE

TO ALL MEMBERS OF DRIVERS AND CHAUFFEURS LOCAL UNION NO. 816 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

AND

EMPLOYEES OF MONTGOMERY WARD AND CO., INCORPORATED, GILBERT CARRIER, AND SIDEL TRUCK LEASING CORPORATION

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members that:

> WE WILL NOT establish or maintain a picket line at the premises of MONTGOMERY WARD AND CO., INCORPORATED, at 75 Varick Street, New York, New York, nor in any other manner induce or encourage the employees of MONTGOMERY WARD AND CO., INCORPORATED, GILBERT CARRIER, or any other employer to engage in a strike or refusal in the course of their employment to perform any services where an object thereof is (1) to force MONTGOMERY WARD AND CO., INCORPORATED, to cease doing business with SIDEL TRUCK LEASING CORPORATION or (2) to force or require SIDEL TRUCK LEASING CORPORATION to recognize or bargain with us unless and until we are certified

as the representative of such employees under the provisions of Section 9 of the Act.

DRIVERS AND CHAUFFEURS LOCAL UNION NO. 816, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
(Labor Organization)

By .....
(Representative) (Title)

Date.....

This notice must remain posted for 60 consecutive days from the date hereof, and must not be altered, defaced or covered by any other material.

APPENDIX C

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 235—October Term, 1960

(Argued February 8, 1961 Decided July 5, 1961)

Docket No. 26375

DRIVERS AND CHAUFFEURS LOCAL UNION NO. 816, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Before:

LUMBARD, *Chief Judge*,
MADDEN, *Judge, U. S. Court of Claims,** and WATERMAN, *Circuit Judge*.

Petitioner seeks review of a decision and order of the National Labor Relations Board based upon a finding that petitioner violated 29 U. S. C. § 158(b)(4)(A) and (b)(4)(B). The Board cross-petitions for enforcement. Enforcement granted.

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* Sitting by designation.

Appendix C—Opinion of United States Court of Appeals for the Second Circuit [1]

COHEN & WEISS (Jack Last, Herbert A. Levy, of counsel, New York City), for Petitioner.

STUART ROTHMAN, General Counsel; DOMINICK L. MANOLI, Associate General Counsel; MARCEL MALLET-PREVOST, Assistant General Counsel; SAMUEL M. SINGER, ALLAN I. MENDELSOHN, Attorneys, National Labor Relations Board, for Respondent.

WATERMAN, *Circuit Judge*:

Drivers and Chauffeurs Local 816 (Union) seeks review of decision and order of the National Labor Relations Board, 127 NLRB Reports 1059, June 1, 1960, directing it to cease and desist its picketing of the premises of Montgomery Ward & Co. at 75 Varick Street, New York, N. Y. The Board cross-petitions for enforcement. The picketing was enjoined by the Board as violative of 8(b)(4)(A) and 8(b)(4)(B) of the National Labor Relations Act, 29 U. S. C. §§ 158(b)(4)(A) and 158(b)(4)(B), subsections that prohibit "secondary boycotts" of "neutral employers." Union maintains that Mongomery Ward should not be classified as a neutral employer and therefore is not entitled to the protection against picketing provided by the "secondary boycott" provisions. This contention was rejected by the Trial Examiner whose findings were accepted *in toto* by the Board.

Pending the Board hearing the United States District Court for the Southern District of New York granted a preliminary injunction pursuant to Section 10(l) of the NLRA, 29 U. S. C. § 160(l), dealt with precisely the same argument, and also rejected it, *McLeod v. Drivers & Chauffeurs Local 816*, 178 F. Supp. 288 (1959), *aff'd*, 277 F. 2d

800 (2 Cir. 1960).[1] The evidence before the Board did not differ in any material respect from the evidence presented at the preliminary injunction hearing, evidence outlined at length in the lower court opinion granting that injunction, 188 F. Supp. 288 at 290-292. As the Board found the facts to be substantially as they were found by the district court, it is not necessary for us to summarize them.

We are of the opinion that the Board's findings are supported by substantial evidence, and that they amply justify the conclusion that Montgomery Ward was a neutral employer within the meaning of the Act. Normally one who hires an independent contractor to perform services will not be considered an employer with respect to the independent contractor's employees. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U. S. 675 (1951); *NLRB v. Bangor Bldg. Trades Council*, 278 F. 2d 287, 1 Cir. 1960); *NLRB v. Local 631, International Hod Carriers*, 270 F. 2d 696 (7 Cir. 1959); *International Hod Carriers, Local 840 v. NLRB*, 181 F. 2d 34 (2 Cir. 1950), *aff'd*, 341 U. S. 694 (1951). This is true even though the independent contractor and its employees are subject to some quantum of control by the party using their services: *UMW v. Osborne Mining Co.*, 279 F. 2d 716 (6 Cir. 1960); *Retail Fruit & Vegetable Clerks v. NLRB*, 249 F. 2d 591 (9 Cir. 1957); *McLeod v. Local 876, Steel, Metal, Allied and Hardware Fabricators and Erectors*, 182 F. Supp. 552 (EDNY 1960); *New Jersey Granite Corp.*, 124

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[1] Of course our affirmance of the [illegible] by the district court does not require us to [illegible] order even when based on substantially [illegible] and of review is quite a different matter [illegible] *Chauffeurs Local Union No. 776*, 178 F. Supp. 288, 289 (S. D. N. Y. 1959); cf. *NLRB v. Local 50, Bakery & Confectionery Workers*, 245 F. 2d 542, 546-47 at n. 4 (2 Cir. 1957).

Appendix C—Opinion of United States Court of Appeals for the Second Circuit

NLRB (1959) relied on by the Trial Examiner). This Circuit has excepted from the general proposition a party who hired an independent contractor so that the latter's employees will perform the services customarily performed by the principal employer's striking employees in order thereby to avoid the effects of the strike. Such a contractor is considered an "ally" of the employer in the dispute with the striking employees and is not protected by the "secondary boycott" provision. *NLRB v. Business Mach. & Office Appliance Mechanics*, 228 F. 2d 553 (2 Cir. 1955), *cert. denied*, 351 U. S. 962 (1956). And, also, the Court of Appeals for the District of Columbia in *Local 74, Retail Clerks International Ass'n v. NLRB*, 266 F. 2d 675 (1959), held that a company which completely dominated and controlled the employees of certain independent contractors to the extent of controlling their hours, living and day-to-day activities would not be an uninvolved employer with respect to the contractor's employees and would not be immune from picketing by a union of the employees.

Here the facts do not [illegible] of those two exceptions, and we hold that [illegible] Montgomery Ward's premises was [illegible]

[illegible]

Order affirmed.

APPENDIX D

Decree

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 26375

DRIVERS AND CHAUFFEURS LOCAL UNION NO. 816, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

Before: LUMBARD, Chief Judge, MADDEN, Judge, U.S. Court of Claims, and WATERMAN, Circuit Judge.

This cause came on to be heard upon the petition of Drivers and Chauffeurs Local Union No. 816, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, to review and set aside an order of the National Labor Relations Board [illegible] and the said Board's cross-petition [illegible] order. The [illegible] February 8, 1961, and [illegible] transcript of record filed in this [illegible] Court, [illegible] and [illegible] granting [illegible]

[illegible]

tions Board in said proceeding be enforced, and that Drivers and Chauffeurs Local Union No. 816, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, representatives, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

J. Edward Lumbard,
Judge, United States Court of Appeals for the Second Circuit

Sterry R. Waterman,
Judge, United States Court of Appeals for the Second Circuit

Filed: August 17, 1961.

A true copy.

A. Daniel Fusaro,
Clerk.

(SEAL)

APPENDIX

NOTICE

To All Members of Drivers and Chauffeurs Local Union No. 816 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

AND

Employees of Montgomery Ward and Co., Incorporated, Gilbert Carriel, and Sidel Truck Leasing Corporation

Pursuant to

A Decree

of the United States Court of Appeals enforcing an order of the National Labor Relations Board, and in order to

effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members that:

> WE WILL NOT establish or maintain a picket line at the premises of MONTGOMERY WARD AND CO., INCORPORATED, at 75 Varick Street, New York, New York, nor in any other manner induce or encourage the employees of MONTGOMERY WARD AND CO., INCORPORATED, GILBERT CARRIER, or any other employer to engage in a strike or refusal in the course of their employment to perform any services where an object thereof is (1) to force MONTGOMERY WARD AND CO., INCORPORATED, to cease doing business with STEEL TRUCK LEASING CORPORATION or (2) to force or require STEEL TRUCK LEASING CORPORATION to recognize or bargain with us unless and until we are certified as the representative of such employees under the provisions of Section 9 of the Act.
>
> DRIVERS AND CHAUFFEURS LOCAL UNION NO. 816, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
> (Labor Organization)
>
> By .....
> (Representative) (Title)

Date.....

This notice must remain posted for 60 consecutive days from the date hereof, and must not be altered, defaced or covered by any other material.

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UMW v. *Osborne Mining Co.*, 279 F. 2d 716 — 9

United States v. *Silk*, 331 U.S. 704 — 9

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

Section 8(b)(4)(A), (B) — 2, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 549

DRIVERS AND CHAUFFEURS LOCAL UNION NO. 816, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 21a–24a) is reported at 292 F. 2d 329. The Board's decision and order (P.A. 30a–34a) [1] are reported at 127 NLRB 1059.

[1] "P.A." and "B.A." references are to the Petitioner's and Board's appendices filed with the court below. Occasional references to undisputed portions of the unprinted transcript of the record are designated "Tr." Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The decision of the court of appeals was issued on July 5, 1961, and a decree was entered on August 17, 1961 (Pet. 21a–27a). The petition for certiorari was filed on November 14, 1961.[a] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings, sustained by the court below, that the relationship between a trucking company and an employer who leased trucks from it was that of independent contractor and neutral employer, so that picketing of the latter was "secondary" and thus banned by Section 8(b)(4) (A) and (B) of the National Labor Relations Act.[b]

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act in effect during the events of this case are set forth at p. 3 of the Petition.

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[a] If the decision of the court of appeals be treated as containing the court's judgment (Pet. 21a, 24a), the petition for certiorari was not filed within the 90-day period specified in 28 U.S.C. 2101(e). Although a decree was entered on August 17, 1961 (Pet. 25a–26a), it did not revise the legal rights or obligations, but was a ministerial formalization of the decision of July 5. See *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206.

[b] The references to Section 8(b)(4) (A) and (B) are to the provisions as they read prior to the 1959 amendments to the Act. The amendments do not affect the disposition of this case.

STATEMENT

A. THE BOARD'S FINDINGS

Montgomery Ward and Company (hereafter called Ward), in addition to other business facilities in New York City, operates a Fashion Pool which serves as a distribution center of women's apparel for Ward's retail outlets throughout the country (P.A. 12a; Tr. 21–23, 28, 92). Pursuant to contract with Ward, Metropolitan Truck Rental Service, a subsidiary of Hertz Corporation (hereafter called Metropolitan), furnished Ward with two trucks and two drivers to transport outbound shipments from the Pool to various merchandise rerouting points throughout the city (P.A. 13a; Tr. 28, 92). Ward had no trucks of its own and has for many years relied on contract carriers for necessary transportation services (P.A. 13a; Tr. 271, 294, 416–418).[4]

The terms of employment under which Metropolitan furnished the two drivers, Wesley and Stern, were governed by a collective bargaining agreement between Local 816 and Motorways, Inc., another subsidiary of Hertz (P.A. 14a; Tr. 327). Under this agreement, Motorways paid the drivers, made all appropriate deductions for withholding taxes and social security, made welfare and pension fund payments, and paid for workmen's compensation (P.A. 14a; B.A. 29). Ward did not authorize the making of

[4] In 1955, Hertz Corporation absorbed and assumed the contract which Rentways, Inc., had maintained with Ward since 1952. Prior to this time, the services had been performed by New York Haulage (P.A. 13a; Tr. 416–418).

this agreement, nor did it in any way participate in its negotiation, nor adopt or ratify its terms (P.A. 19a; B.A. 26–27). Additionally, there is no evidence in the record to show that Ward owned any stock in any of the corporations in the Hertz complex: nor did it exercise any control over their business operations or labor relations (P.A. 19a).

In the contract between Ward and Metropolitan, Ward agreed to pay a flat weekly rate for each "truck with driver" regularly furnished (P.A. 15a–16a; 42a–43a). Metropolitan, for its part, maintained, repaired and operated the vehicles at its own expense, in the Hertz garage; it obtained all necessary permits and licenses, and, with the exception of cargo insurance, sustained all expenses of insurance and indemnity (P.A. 15a–16a; 42a, 45a–47a). The two trucks were painted in accordance with Ward's specifications, carrying its name, colors, and advertising symbols (P.A. 14a, 42a).

The contract provided, in part, that (P.A. 16a; 48a–49a):

> It is understood that this is not an agreement of partnership or employment of Carrier or any of Carrier's employees by Wards, and it is expressly understood and agreed that the equipment and personnel referred to above shall at all times be under the sole and absolute control of Carrier, who shall have the sole right to employment and discharge of personnel.

Accordingly, all personnel, wage, and related administrative records for the two drivers were maintained by Metropolitan-Hertz and neither of the drivers was processed through the customary hiring procedures

maintained by Ward; nor did they at any time fill out the standard Ward's employment form (P.A. 18a; B.A. 29–30). Ward maintained no personnel files for the drivers, did not require them to undergo the physical examination mandatory for all Ward's employees, and did not include them in the Ward's employee pension or group insurance plans (B.A. 18–22).[5]

Both drivers reported at the Hertz garage each morning, punched a Hertz time clock, and picked up their trucks (P.A. 13a; B.A. 29–30). They then drove to the Fashion Pool, where they received routine instructions as to loads and destinations (P.A. 13a–14a; B.A. 31, 33–34). Their work required little or no supervision and they received no instructions as to particular delivery routes (P.A. 14a; B.A. 13, 33–34). After completing their work day, they returned to the Hertz garage and punched out (B.A. 30, 35, 39). In the event of a mechanical breakdown during deliveries, the drivers would call Metropolitan for a replacement truck or a mechanic (B.A. 31–33, 35). Accident reports were filed only with Metropolitan on standard Metropolitan forms (*ibid.*).

On August 31, 1959, Ward, after appropriate notice, cancelled its contract with Metropolitan and entered into a contract with Sidel Truck Leasing Corporation. The contract arrangements between Ward and Sidel were in all material respects substantially identical to those previously existing between Ward and Metropolitan (P.A. 15a–16a).

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[5] Wesley and Stern worked under this system for some 15 and 8 years respectively. Both survived the transfer from Rentways to Hertz, and Wesley also survived the previous transfer from New York Haulage to Rentways.

Upon Ward's cancellation of its contract with Metropolitan, the Hertz dispatcher informed Wesley and Stern of the termination of their employment. Neither of the drivers was processed through any of the customary Ward's discharge procedures (B.A. 22–23, 34, 38–39). On September 1, petitioner's representative Foranzo, accompanied by the two discharged drivers, visited Ebling, Ward's traffic manager at the Fashion Pool (P.A. 16a; B.A. 10–12). Foranzo demanded that the drivers be restored to the payroll. When Ebling refused and replied that the drivers were employees of Hertz and not Ward, Foranzo, accompanied by the drivers, walked out and stated that the "Union would take the necessary action" (P.A. 16a; B.A. 10–12). The following day, the two drivers appeared at the Fashion Pool and commenced picketing, with signs stating that Ward was "unfair" to Local 816. Thereafter, incoming deliveries ceased at the Fashion Pool and, as a result, 90 of the 130 Fashion Pool employees were laid off and business at the Pool ceased (P.A. 17a; B.A. 18).

Meanwhile, on September 1, Lester Connell, secretary-treasurer of petitioner, telephoned Kenneth Sidel and informed him that the operation at the Fashion Pool for which Sidel Truck Leasing Corporation now had a contract was subject to an existing contract, as to the drivers, with Local 816 (P.A. 18a; B.A. 6–7). Connell demanded that the existing contract be continued with respect to the drivers and that they be put back to work the following day (*ibid.*). Sidel, who had already arranged to place on the Ward's contract two drivers from Teamster Local 138, tele-

phoned officials of Local 138 (P.A. 18a; B.A. 8–9). As a result of these conversations, Sidel offered to assume the contract between Local 816 and Metropolitan until its expiration date, August 31, 1960, but thereafter he wished to be free to negotiate with Local 138 (*ibid.*). Connell replied that, at such time as the contract terminated, he and Sidel would negotiate further. Lacking prior agreement on this matter, Sidel refused to assume the Metropolitan-Local 816 contract and the picketing at the Fashion Pool continued until September 19, when it was enjoined under Section 10(l) of the Act, pending the Board's decision.[6]

B. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board concluded that petitioner violated Section 8(b)(4) (A) and (B) of the Act. The Board found that the picketing at Ward's Fashion Pool location had dual purposes: (1) to force Ward to cease doing business with Sidel and to engage a carrier-contractor who would recognize petitioner as the bargaining agent for the drivers supplied under contract; and (2) to force Sidel to recognize petitioner as the representative of the drivers though it was not certified as such. The Board further found that the arrangements between Ward and both trucking companies established an independent contractor relationship rather than one in which Ward became the co-employer of the drivers.

[6] *McLeod* v. *Drivers and Chauffeurs Local Union No. 816 I.B.T.*, 178 F. Supp. 288 (S.D.N.Y.), affirmed, 277 F. 2d 800 (C.A. 2).

Thus, Ward was a neutral employer in petitioner's dispute with the trucking companies and entitled to the protection of Section 8(b)(4) (A) and (B). (Pet. 10a–11a.) The Board ordered petitioner to cease and desist from the unfair labor practices found and to post appropriate notices (Pet. 16a–18a).

C. THE DECISION OF THE COURT OF APPEALS

The court below held, as did the Board, that Ward was a neutral employer within the meaning of Section 8(b)(4) (A) and (B) of the Act and that the picketing was, as a consequence, violative of the Act. The court pointed out (Pet. 23a) that "normally one who hires an independent contractor to perform services will not be considered an employer with respect to the independent contractor's employees * * * even though the independent contractor and its employees are subject to some quantum of control by the party using their services." The Board's order was, therefore, enforced in full.

ARGUMENT

Petitioner's basic contention is that its picketing of Ward, in furtherance of its dispute with the trucking companies over the drivers supplied under contract with Ward, was "primary" and thus outside the ambit of the secondary boycott provisions of the Act, because the arrangement between the companies and Ward was such that Ward became in effect the co-employer of the truck drivers (Pet. 8–13). The Board's finding, affirmed by the court below, that the trucking companies were independent contractors and that Ward was a neutral employer for

purposes of Section 8(b)(4) of the Act presents no issue warranting review by this Court, for it turns on the particular facts of this case. In any event, the evidence summarized in the Statement (pp. 3–8) amply supports the finding that Ward did not lose its neutral status by leasing trucks with drivers from the companies.[7] See *National Labor Relations Board* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675; *UMW* v. *Osborne Mining Co.*, 279 F. 2d 716 (C.A. 6); *National Labor Relations Board* v. *Bangor Bldg. Trades Council*, 278 F. 2d 287 (C.A. 1); *Retail Fruit & Vegetable Clerks Union* v. *National Labor Relations Board*, 249 F. 2d 591 (C.A. 9).

This case is distinguishable from *Local No. 24, International Brotherhood of Teamsters* v. *National Labor Relations Board*, 266 F. 2d 675 (C.A. D.C.), where the lessee of trucking services was held to be an employer of the drivers supplied with the trucks (Pet. 9–13). As the court below observed, there, unlike here, the elements of control by the lessee were so extensive that the operations of the independent contractor and its employees were "completely dominated and controlled" (Pet. 24a).

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[7] The question whether an independent contractor or an employer-employee relationship is established depends essentially on the degree of control over the work and those performing it which is exercised by the person contracting for the services. Under settled principles, Ward's control over the drivers supplied by the trucking companies (see pp. 4–5, *supra*) was not substantial enough to negate an independent contractor relationship. See *United States* v. *Silk*, 331 U.S. 704; *National Labor Relations Board* v. *Steinberg*, 182 F. 2d 850 (C.A. 5); *National Van Lines* v. *National Labor Relations Board*, 273 F. 2d 402 (C.A. 7).

Petitioner's reliance (Pet. 13-16) on the cases holding that an employer loses his neutral status by performing "struck work" (see *Douds* v. *Metropolitan Federation of Architects*, 35 F. Supp. 672 (S.D. N.Y.); *National Labor Relations Board* v. *Business Machine & Office Appliance Mechanics*, 228 F. 2d 553 (C.A. 2), certiorari denied, 351 U.S. 962), is entirely misplaced. The court below correctly noted (Pet. 24a) that the "struck work" doctrine is not applicable to the situation here, for Ward was not performing work which the trucking companies would otherwise have done but for a strike.

We note that the panel of the court below which decided the instant case consisted of Circuit Judges Waterman (who wrote the opinion) and Lumbard, and Court of Claims Judge Madden, sitting by designation. The question whether a Court of Claims Judge may properly be authorized to sit on the Court of Appeals is pending before this Court in *Glidden Co.* v. *Zdanok*, No. 242, this Term, certiorari granted, October 9, 1961, 368 U.S. 814. However, since that question is not presented in the petition in this case, we do not believe the disposition of the petition need be postponed pending the outcome of that case.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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